No. 09-569

IN THE

Supreme Court of the United States

ROBERT BYLIN, *et ux.*,

Petitioners,

v.

JOHN R. BILLINGS, OWEN TUCKER, and OPEN CREEK OUTFITTING, LLC,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Petitioners were afforded all the process that is due under the circumstances of this case.

2. Whether the court of appeals properly refused to consider an issue raised for the first time on appeal without denying Petitioners due process of law.

3. Whether the federal district court properly exercised its discretion in granting Respondents' Federal Rule of Civil Procedure 15(a) motion.

CORPORATE DISCLOSURE STATEMENT

Respondent, Open Creek Outfitting, LLC, has no parent corporation and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF CITED AUTHORITIES	v
INTRODUCTION AND SUMMARY OF THE REASONS FOR DENYING THE PETITION	1
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE PETITION	7
I. THE DISTRICT COURT AFFORDED PETITIONERS ALL THE PROCESS THAT WAS DUE UNDER THE CIRCUMSTANCES OF THIS CASE	7
II. THE COURT OF APPEALS PROPERLY REFUSED TO CONSIDER PETITIONERS' ARGUMENT THAT RESPONDENTS' RULE 15 MOTION SHOULD BE GOVERNED BY THE GOOD CAUSE STANDARD OF RULE 16 BECAUSE IT WAS RAISED FOR THE FIRST TIME ON APPEAL	12

Contents

Page

III. THE DISTRICT COURT PROPERLY CONSIDERED THE RELEVANT FACTORS IN CONSIDERING RESPONDENTS' MOTION FOR LEAVE TO AMEND. ITS DECISION DOES NOT CONFLICT WITH ANY RELEVANT DECISION OF THIS COURT OR ANY OTHER COURT OF APPEALS. IT IS UNNECESSARY FOR THIS COURT TO RESOLVE THE SPLIT IN THE CIRCUITS OVER THE SHOWING NECESSARY FOR UNDUE DELAY 13

CONCLUSION 18

TABLE OF CITED AUTHORITIES

Page

Federal Cases

Armstrong v. Manzo, 380 U.S. 545 (1965) 9

Block v. First Blood Assocs., 988 F.2d 344 (2d Cir. 1993) 15

Brewster v. Board of Educ. of the Lynwood Unified School Dist., 149 F.3d 971(9th Cir. 1998) 9

Clark v. Hous. Auth. of Alma, 971 F.2d 723 (11th Cir. 1992) 10

Coletti v. Cudd Pressure Control, 165 F.3d 767 (10th Cir. 1999) 15

English v. Cowell, 10 F.3d 434 (7th Cir. Ill. 1993) 11

Feeney, et al. v. Dunham, 2007 U.S. Dist. LEXIS 28808 (Dist. Conn. 2007) 16

Foman v. Davis, 371 U.S. 178 (U.S. 1962) ... 1, 2, 14

Gleeson v. Prevoznik, 2006 U.S. Dist. LEXIS 80187 (M.D. Pa. 2006) 16-17

Long v. Wilson, 393 F.3d 390 (3d Cir. 2004) 17

Cited Authorities

	Page
Mathews v. Eldridge, 424 U.S. 319 (1976)	9
Miranda v. S. Pac. Transp. Co., 710 F.2d 516 (9th Cir. 1983)	10
Oppenheimer v. Morton Hotel Corporation, 324 F.2d 766 (6th Cir. 1963)	10
Orr v. City of Albuquerque, 417 F.3d 1144 (10th Cir. 2005)	15
Owens v. Kaiser Found. Health Plan, Inc., 244 F.3d 708 (9th Cir. 2001)	17
Prokop v. Hockhalter, 2006 WY 75, 137 P.3d 131 (Wyo. 2006)	4
Smith v. Ford Motor Co., 626 F.2d 784 (10th Cir. 1980)	10
United States v. Diaz-Villafane, 874 F.2d 43 (1st Cir. 1989)	10
United States v. Eleven Vehicles, 200 F.3d 203 (3d Cir. 2000)	10
Wessel v. City of Albuquerque, 299 F.3d 1186 (10th Cir. 2002)	14
Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321 (1971)	14

Cited Authorities

Page

Federal Rules

Fed. R. Civ. P. 15 ..... i, 1, 2

Fed. R. Civ. P. 16 ..... 12, 13

Fed. R. Civ. P. 61 8

Sup. Ct. R. 10 ..... 1, 7

INTRODUCTION AND SUMMARY OF THE REASONS FOR DENYING THE PETITION

The Petition for Writ of Certiorari ("Petition") fails to present any matter meriting review by this Court. *See* Sup. Ct. R. 10. Petitioners were provided all the process that was due under the circumstances of this case. Petitioners were provided both notice and an opportunity to be heard prior to the district court's granting of Respondents' motion for leave to amend their answer and any perceived error made by the district court in shortening the time for Petitioners to file a written response after hearing oral arguments was harmless.

Because Petitioners were not deprived of due process in the lower court, it follows that the court of appeals appropriately refused to consider Petitioners' argument that the Rule 15(a) motion should have been considered under the good cause standard of Rule 16, which argument was raised for the first time on appeal. Although the court of appeals ultimately refused to consider the issue, it commented that even if Rule 16 were applied in this instance, it would unlikely lead to a different outcome given the "rough similarity" between the standards of the two rules. (Pet. App. 13a-14a).

The final question presented by Petitioners is also not worthy of this Court's review. This Court set forth certain factors to be considered when a court exercises discretion in contemplating a Fed. R. Civ. P. 15(a) motion. *See, e.g., Foman v. Davis*, 371 U.S. 178, 182 (1962).

The district court appropriately determined that there was no bad faith related to the delay in filing the motion for leave to amend and that the delay did not unfairly prejudice the Petitioners. The district court's decision in this regard does not conflict with this Court's ruling in *Foman*, nor any decision by any other court. Although Petitioners contend that a circuit court split exists with respect to one of the factors, undue delay, which may be considered when contemplating a Rule 15(a) motion, this is simply not an issue that requires uniformity among the circuits given the liberality of the rules for amending pleadings and the deference afforded to district courts in determining such motions.

For the foregoing reasons, the Petition should be denied.

STATEMENT OF THE CASE

This lawsuit arose out of a horse accident that occurred on a hunting trip guided by Defendant Open Creek Outfitting, LLC, ("Open Creek") in October of 2003. (Aplt. App. at 13-14). Specifically, Plaintiff Robert Bylin ("Bylin"), a client of Open Creek, was injured when the horse he was riding began to jump and buck unexpectedly. (Aplt. App. at 14).

Earlier in 2003, Bylin purchased an elk hunting trip from Open Creek, a limited liability company organized under the laws of the state of Wyoming. (Aplt. App. at 12-13). The members of Open Creek were Defendants Owen Tucker ("Tucker") and John R. Billings ("Billings"). (Aplee. Supp. App. at 50, 114, 195). Tucker was licensed as an outfitter by the Wyoming Board of

Professional Outfitters and Guides (the "Board"). (Aplee. Supp. App. at 194-196). Billings was not a licensed outfitter or guide. Pursuant to the Board's rules and regulations, Tucker was the "outfitter of record" for Open Creek. (Aplee. Supp. App. at 194-196). The two guides employed by Open Creek led Bylin's hunting trip and matched Bylin with the horse that bucked Bylin off. (Aplee. Supp. App. at 45-47). Both guides were licensed as professional guides under Tucker's outfitter's license and were present at the time of Bylin's injury. (Aplee. Supp. App. at 44-49, 122-123, 187-189, 191-193). Billings was not present when Bylin was injured, nor did Billings match Bylin with the subject horse. (Aplee. Supp. App. at 21, 115).

Petitioners filed their complaint on April 20, 2007 – three and one-half years after the accident. (Aplt. App. at 2, 11-24). Petitioners asserted several causes of action: (1) negligence (breach of reasonable care); (2) negligent hiring and supervision; (3) negligent misrepresentation; (4) negligent infliction of emotional distress; and (5) loss of consortium. (Aplt. App. at 11-24). Respondents Billings, Tucker, and Open Creek, collectively "Respondents", answered the complaint on May 23, 2007. (Aplt. App. at 2). In their answer, Respondents asserted several affirmative defenses. (Aplt. App. at 25-35). Respondents, however, did not assert that Petitioners claims were barred by the two-year professional malpractice statute of limitations. (Aplt. App. at 25-35).

Respondents filed their pretrial memorandum on December 28, 2007, with their previously filed summary judgment motion still pending. (Aplt. App. at 52-64). Petitioners' pretrial memorandum followed on December 31, 2007. (Aplt. App. at 6). In their pretrial memorandum, Petitioners indicated, for the first time, that they desired to amend their complaint to assert a fraud claim against Respondent Billings. (Aplt. App. at 102, 111). In preparing to address this potential new claim at the pretrial conference, Respondents researched the statute of limitations for fraud claims. (Aplt. App. at 111). In doing so, Respondents discovered a recently decided case from the Wyoming Supreme Court, *Prokop v. Hockhalter*, 2006 WY 75, 137 P.3d 131 (Wyo. 2006), holding that the two-year professional malpractice statute of limitations applies to claims against professional outfitters and guides. (Aplt. App. at 111). Respondents immediately filed a motion for leave to amend their answer pursuant to Fed. R. Civ. P. 15(a) to assert the affirmative defense that all of Petitioners' claims are barred by the two-year statute of limitations. (Aplee. Supp. App. at 116-123). Copies of the 2003 licenses issued to Tucker and the two employee-guides were attached to the motion. (Aplee. Supp. App. at 121-123).

The final pretrial conference was held on January 8, 2008, one day after Respondents filed their motion to amend. (Aplt. App. at 106-202). At the conference, Petitioners' counsel informed the court that he was prepared to address Respondents' motion for leave to amend. (Aplt. App. at 111). The court heard argument from both sides and took the matter under advisement, stating it would review the authorities cited by the

parties and make a decision.[1] (Aplt. App. at 111, 129-133, 182-83). At Petitioners' request, the court also reopened the record with respect to Respondents' pending motion for summary judgment. (Aplt. App. at 193-198).

On January 15, 2008, Respondents then supplemented the record in support of their motion with affidavit and deposition testimony confirming that Tucker was the licensed outfitter of record for Open Creek and that the two guides were licensed professional guides at the time of the accident. (Aplee. Supp. App. at 139-199). In supplementing the record, Respondents stated:

> "[t]his evidence is being submitted so that, in the event the Court grants [Respondents'] motion for leave to amend, the record will

1. Petitioners do not include the full discussion concerning the motion for leave to amend and also misrepresent to this Court that the motion had not been read by Petitioners' counsel prior to the final pretrial conference. (Pet at 6). A review of the transcript from the final pretrial conference shows that Petitioners were prepared to argue the issue (and thus had read the motion) and informed the court of the "extreme" prejudice it would suffer if the motion were granted. (Aplt. App. at 111, 129-133). Further, Petitioners' counsel provided case cites for law purporting to support their opposition to the motion. (Aplt. App. at 132-133). Finally, although the district court at one point stated the statute of limitations defense was "gone", it agreed to take the matter under advisement and render a final decision at a later date. (Aplt. App. at 136, 182-183). Petitioners' counsel then asked the court for at least a couple of days to respond and promised "to get it filed as soon as I absolutely can."(Aplt. App. at 183-184).

> include sufficient admissible evidence for the Court to grant [Respondents] judgment as a matter of law on the basis that [Petitioners'] claims, and all of them, are barred by the applicable statute of limitations under the *Prokop* decision."[2]

(Aplee. Supp. App. at 141).

After receiving supplemental materials submitted from both parties and being well aware of the parties' respective positions on the motion due to hearing oral arguments on the matter, the district court granted Respondents' motion for leave to amend and deemed the answer amended to include the limitations defense, correctly finding that Petitioners could not establish legally cognizable prejudice and that Respondents had not acted in bad faith. (Aplt. App. at 204-208). Because the court previously reopened the record, the court also deemed the limitations defense raised for purposes of summary judgment. (Aplt. App. at 204-208). Petitioners were then given an additional five (5) days to respond to the affirmative defense. (Aplt. App. at 204-208). On January 16, 2008, Petitioners filed their supplemental response to Respondents' motion for summary judgment as well as their response to the order granting leave to amend. (Aplt. App. at 8, 209-221).

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2. Petitioners continue to claim that the district court *sua sponte* converted the motion for leave to amend into one for summary judgment. (Pet. at 10). As the court of appeals correctly points out, though, Respondents' request to supplement the record in support of their motion for summary judgment was in effect a motion to amend their summary judgment motion. (Pet. App. 6a, fn.6).

Thereafter, the court requested supplemental briefing on the application of the statute of limitations to Billings. (Aplt. App. at 222-223). Both parties submitted the additional briefing. (Aplee. Supp. App. at 200-238). The court ultimately concluded that the two-year statute of limitations applied and barred all of Petitioners' claims as to all Respondents. (Aplt. App. at 224-230). This appeal followed. (Aplt. App. at 232). This decision was affirmed by the United States Court of Appeals for the Tenth Circuit. Petitioners' request for rehearing on the matter was denied. The Petition pending before this Court followed.

REASONS FOR DENYING THE PETITION

The decisions below are wholly consistent with the principles of fundamental fairness that govern judicial proceedings and do not conflict with a decision of this Court or any other court presented with these same facts. Therefore, Petitioners have not carried their burden of demonstrating any "compelling reason" for the Petition to be granted. *See* Sup. Ct. R. 10.

I. THE DISTRICT COURT AFFORDED PETITIONERS ALL THE PROCESS THAT WAS DUE UNDER THE CIRCUMSTANCES OF THIS CASE

Petitioners contend that they were denied due process of law because the district court rendered its decision to grant Respondents' motion for leave to amend their answer to assert the statute of limitations defense four days prior to the expiration of the time for Petitioners to file a written response. Petitioners

suggest that this somehow negated their fundamental due process right to be heard on a motion impacting their substantial rights. (Pet. at. 3). Petitioners' denial of due process claim rings hollow, though, when it is remembered that they filed their tort claim approximately one and a half years after the statute of limitations had run.

Despite the fact that Petitioners filed an untimely claim, they now seek redress with this Court based on the district court's alleged procedural error. Although Petitioners assert that the motion for leave to amend impacted their substantial rights, it was simply a motion that ultimately led to placing Petitioners in the same position they were in on the day their untimely claim was filed.[3] Nonetheless, Petitioners were provided all the process that was due under the particular circumstances of this case. Petitioners were provided both notice and an opportunity to be heard prior to the district court's granting of Respondents' motion for leave to amend their answer. Any perceived error made by the district court in shortening the time for Petitioners to file a written response after hearing oral arguments on the issue is harmless and not worthy of this Court's review.

This Court has long held that "[t]he fundamental requirement of due process is the opportunity to be

3. In fact, it is doubtful that a non-dispositive motion, such as the one at issue here, affects a substantial right. *See*, Fed. R. Civ. P. 61 (explaining that "[a]t every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights.").

heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (citing *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)) (quotations omitted). However, "due process is flexible and calls for such procedural protections as the particular situation demands." *Id.* at 334 (citations omitted). "Precisely what procedures the Due Process Clause requires in any given case is a function of context." *Brewster v. Board of Educ. of the Lynwood Unified School Dist.*, 149 F.3d 971, 983 (9th Cir. 1998). Here, Petitioners were given all the procedural protections the situation demanded.

As explained above, Petitioners orally responded to Respondents' motion for leave to amend at the final pretrial conference. Petitioners informed the district court that they were prepared to argue the issue and did so by asserting the "extreme" prejudice they would suffer given the effort and money expended in the litigation to date. (Aplt. App. at 111,129-133). Petitioners also provided case law cites to the court for its consideration of the issue. (Aplt. App. at 129-133). Thereafter, and at Petitioners' request, the district court reopened the record to allow both parties to supplement it with respect to Respondents' pending summary judgment motion. (Aplt. App. at 192-198). Petitioners then had several business days in which to file a written response, though the court rendered its decision prior to expiration of the time allowed under the local rules.

Although the time for filing a written response as set forth in the local rules was cut short by the district

court, this error (if at all) was harmless.[4] For example, in the context of summary judgment where the lower court granted the dispositive motion prior the expiration of time for filing a response, courts have held such error is harmless in the absence of prejudice to the non-moving party. *See, e.g., Oppenheimer v. Morton Hotel Corporation*, 324 F.2d 766, 768 (6th Cir. 1963) (holding that it is not reversible error for a district court to grant summary judgment before the expiration of the 10-day response period, if no prejudice can be demonstrated by the unsuccessful party.)

In this case, Petitioners were not up against a dispositive motion, but rather a motion for leave to amend to assert an affirmative defense. Petitioners had

4. A district court's local rules of practice are technically binding on both the court and the parties. However, "[c]onsiderable deference is accorded to the [court's] interpretation and application of [its] own rules of practice and procedure." *Smith v. Ford Motor Co.*, 626 F.2d 784, 796 (10th Cir. 1980). *See also, Clark v. Hous. Auth. of Alma*, 971 F.2d 723, 727 (11th Cir. 1992); *United States v. Diaz-Villafane*, 874 F.2d 43, 46 (1st Cir. 1989); *Miranda v. S. Pac. Transp. Co.*, 710 F.2d 516, 521 (9th Cir. 1983). As long as the court has a sound rationale and does not unfairly prejudice a party, the court may permissibly "depart form the strictures of its own local procedural rules." *United States v. Eleven Vehicles*, 200 F.3d 203, 215 (3d Cir. 2000). In this case, the court presumably shortened the time frame to respond to the pending motion because trial was rapidly approaching, necessitating expedition of the pretrial proceedings. Petitioners were not unfairly prejudiced by the departure from the local rules because the district court had the benefit of their argument from the final pretrial conference and Petitioners were given several days thereafter within which to file a written response.

already provided opposition to the motion at a hearing before the district court's decision was entered. Thereafter, Petitioners were permitted additional time to oppose the affirmative defense. (Pet. App. 27a). As a result, Petitioners cannot and have not demonstrated any prejudice they suffered because the district court rendered its decision four days before the expiration of time for Petitioners to file a written response. *See, e.g., English v. Cowell*, 10 F.3d 434, 438 (7th Cir. Ill. 1993) (discussing that the "harmless error doctrine saves premature rulings when the district court is found to have entertained the nonmovants' arguments on a prior or subsequent motion.")

The district court had all the information it needed to render the decision it did. Petitioners have not provided the lower court, the court of appeals, or this Court with any information on what more should have been considered by the lower court in determining the motion for leave to amend that would have been outcome determinative.[5] Nor did Petitioners request that the court reconsider its decision upon the filing of Petitioners' written response. This is likely so because the written response failed to present any new argument

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5. Petitioners appear to claim that they were prejudiced by the amendment of the answer because they were prevented from conducting additional discovery on the issue. (Pet. at 7, 16-17). However, Petitioners have never demonstrated what additional facts they hoped to uncover during discovery that would be outcome determinative. The record reflects the outfitters and guides were licensed and, therefore, subject to the two-year statute of limitations in Wyoming. (Aplee. Supp. App. at 187-189, 191-196) No amount of additional discovery could change those facts.

or reason why Respondents' motion should be denied. Accordingly, the failure to allow Petitioners the full ten-day period to file a written response to the motion is harmless.

II. THE COURT OF APPEALS PROPERLY REFUSED TO CONSIDER PETITIONERS' ARGUMENT THAT RESPONDENTS' RULE 15 MOTION SHOULD BE GOVERNED BY THE GOOD CAUSE STANDARD OF RULE 16 BECAUSE IT WAS RAISED FOR THE FIRST TIME ON APPEAL

Petitioners next claim that because the district court shortened the time for them to file a written response to Respondents' motion, they were effectively prevented from making any arguments relative to the motion on appeal. Because Petitioners were not deprived of due process in the lower court, it follows that the court of appeals' refusal to consider a new argument did not deprive Petitioners of due process.

Specifically, Petitioners contend the court of appeals denied them due process because it refused to decide the issue of whether the standards governing Fed. R. Civ. P. 16 apply to Respondents' motion for leave to amend. Of importance, Petitioners did file a written response to the motion, albeit after the district court rendered its decision, and in that response, made no mention of the newly asserted Rule 16 argument. Accordingly, even if the written response had been received by the district court prior to its decision, the Rule 16 argument would not have been before it. Thus, Petitioners were not harmed by the court of appeals'

refusal to consider this argument for the first time on appeal.

Notably, the court of appeals did comment in its decision that application of Rule 16 in this instance would unlikely lead to a different outcome given the "rough similarity" between the "undue delay" standard of Rule 15 and the "good cause" standard of Rule 16 and the wide discretion afforded district courts in applications of that Rule (Pet. App. 13a-14a), thus demonstrating the lack of merit in Petitioners' claim that application of Rule 16 standards would have "undoubtedly resulted in the denial of the motion for leave to amend". (Pet. at 12).

III. THE DISTRICT COURT PROPERLY CONSIDERED THE RELEVANT FACTORS IN CONSIDERING RESPONDENTS' MOTION FOR LEAVE TO AMEND. ITS DECISION DOES NOT CONFLICT WITH ANY RELEVANT DECISION OF THIS COURT OR ANY OTHER COURT OF APPEALS. IT IS UNNECESSARY FOR THIS COURT TO RESOLVE THE SPLIT IN THE CIRCUITS OVER THE SHOWING NECESSARY FOR UNDUE DELAY.

Petitioners final contention is that the district court improperly focused on determining whether Petitioners would be unfairly prejudiced by the granting of leave to amend instead of finding undue delay as a basis to deny leave to amend. Petitioners then describe a split in the circuit courts regarding the showing necessary to deny a motion for leave to amend for undue delay. While it appears there is a majority and minority view in the circuits concerning the showing necessary for undue

delay, this circuit split is of no moment to this case. The issue is not whether the district court properly *denied* the request for leave to amend. Rather, the issue is whether it was proper for leave to be *granted*. Given the wide discretion given to the courts in contemplating motions for leave to amend and the factual nature of the inquiry, this simply is not an issue that requires uniformity among the circuits and certainly does not present an issue requiring resolution by this Court.

Federal Rule of Civil Procedure 15(a) states that such leave "shall be freely given when justice so requires." This Court has articulated that "this mandate is to be heeded." *Foman v. Davis*, 371 U.S. at 182.

> "In the absence of any apparent or declared reason — such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. — the leave sought should, as the rules require, be 'freely given'."

Id. "The grant of leave to amend the pleadings pursuant to Rule 15(a) is within the discretion of the trial court," and such decision will not be reversed by the appellate court absent an abuse of that discretion. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330 (1971); *Wessel v. City of Albuquerque*, 299 F.3d 1186, 1197 (10th Cir. 2002). An abuse of discretion does not occur unless the district court's decision "is arbitrary,

capricious, whimsical, or manifestly unreasonable." *Orr v. City of Albuquerque*, 417 F.3d 1144, 1153 (10th Cir. 2005) (citing *Coletti v. Cudd Pressure Control*, 165 F.3d 767, 777 (10th Cir. 1999).

A review of the district court's order shows that it carefully considered the relevant factors when it contemplated the pending motion for leave to amend. In particular, the district court determined that Respondents did not exhibit bad faith related to the delay in filing the motion and that such delay did not unfairly prejudice Petitioners. (Pet. App. 26a). Although Petitioners fault the district court for failing to deny the motion on the basis of undue delay, the district court did not abuse its discretion in granting the motion in the absence of finding undue prejudice to the Petitioners.

In deciding if undue prejudice will result to a plaintiff opposing a defendant's motion to amend his answer to include a limitations defense, the circuit courts generally consider whether allowing the amendment will: (i) require the opponent to expend significant additional resources to conduct discovery and prepare for trial; (ii) significantly delay the resolution of the dispute; or (iii) prevent the opponent from bringing a timely action in another jurisdiction. *Block v. First Blood Assocs.*, 988 F.2d 344, 350 (2d Cir. 1993). None of these factors weighed in favor of denying Respondents' motion, thus the district court correctly found no undue prejudice.

With respect to the first prejudice factor, it was clear that allowing the limitations defense would not require

Petitioners to expend any additional resources to conduct discovery or prepare for trial because all of the material facts necessary to decide the limitations issue were already established in the record before the court granted Respondents' motion to amend. The district court recognized that deciding the limitations defense would simply involve applying these already-established facts to a mathematic formula, noting correctly that the dates to be inserted in such formula — i.e., the date suit was filed and the date of the accident — could not be changed by any amount of discovery.

With respect to the second prejudice factor, it was clear that allowing the limitations defense would not delay resolution of the dispute. In fact, allowing the limitations defense served judicial economy in that it quickly resolved all outstanding claims.

With respect to the third prejudice factor, it was clear that Petitioners could not have timely brought their claims in another jurisdiction. The only other jurisdiction in which the claims could ever have been filed is state court in Wyoming, and as aptly noted by the district court, Petitioners' claims were already time barred on the date suit was filed.

The fact that allowing the limitations defense will defeat a plaintiff's claim is not the type of "prejudice" that prevents a motion for leave to amend from being granted. In other words, "the mere fact that a claim may be time-barred by allowing an answer to be amended to assert the limitations defense does not constitute prejudice." *Feeney, et al. v. Dunham*, 2007 U.S. Dist. LEXIS 28808 (Dist. Conn. 2007) (*quoting Gleeson v.*

Prevoznik, 2006 U.S. Dist. LEXIS 80187 (M.D. Pa. 2006)). *See also, Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 713 (9th Cir. 2001) (stating that prejudice cannot be demonstrated based solely on the untimely assertion of the affirmative defense as the defense would have been dispositive had it been asserted when the action was filed); *Long v. Wilson*, 393 F.3d 390, 400 (3d Cir. 2004) ("The frustrated expectation of not having an untimely . . . petition heard on the merits does not establish prejudice sufficient to defeat an amendment to an answer.").

Petitioners' request urging that this Court now require a showing of good cause before leave to amend will be granted is based solely on the wholly illogical premise that, despite Petitioners' original failure to file their suit on time, Petitioners are entitled to, and will somehow suffer injustice if they are not allowed to, take advantage of Respondents' mistake of failing to identify their limitations defense sooner.

Respondents respectfully submit that the liberal amendment rules are not designed to excuse a petitioners' late filing when a respondent, acting in good faith, discovers the limitations defense and immediately files the appropriate motion for leave to amend his answer, and the court, after hearing from both parties, determines that there was no bad faith, that allowing the amendment will not prejudice the petitioners, and then affords the petitioners ample opportunity to respond to the limitations defense.

CONCLUSION

For all of the foregoing reasons, Respondents respectfully request that the Court deny the Petition.

Respectfully submitted,

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